Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1998

MARILYN PONA,

Petitioner,

-v-

CECIL WHITTAKER'S INC. et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DOES A SPECIAL ORDER OF A POLICE DEPARTMENT, PROMULGATED BY THE CHIEF OF POLICE AND WRITTEN, PUBLISHED, AND APPLIED TO ALL POLICE ACTIVITY, CONSTITUTE A POLICY OF THE BOARD OF POLICE COMMISSIONERS FOR PURPOSES OF MUNICIPAL LIABILITY UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT AND THE MISSOURI HUMAN RELATIONS ACT?

2. IS DENIAL OF ADMITTANCE TO A SERVICE ANIMAL A DENIAL OF MEANINGFUL ACCESS TO A PERSON WITH A DISABILITY?

3. DOES A POLICE POLICY OF REFUSING TO ENFORCE CRIMINAL STATUTES FORBIDDING DISCRIMINATION AGAINST PERSONS WITH DISABILITIES IN PLACES OF PUBLIC ACCOMMODATION ITSELF DISCRIMINATE AGAINST THE PERSONS THE STATUTES EXPLICITLY PROTECT?

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OPINIONS BELOW

The opinion of the Federal District Court is unpublished. The opinion of the panel of the Eight Circuit Court of Appeals is published as *Pona v. Cecil Whittaker's, Inc.*, 155 F.3d 1034 (8th Cir. 1998). The order of the U.S. Court of Appeals for the Eight Circuit denying petition for rehearing and suggestion for rehearing *en banc* has not been reported and is attached in Appendix 36a.

JURISDICTION

The judgment of the panel of the Eighth Circuit Court of Appeals was entered on September 18, 1998. The Order of the Eighth Circuit denying Marilyn Pona's petition for rehearing and suggestion for rehearing *en banc* was entered on November 24, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

42 U.S.C. § 12132 Sec. 202. Discrimination

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 USC § 12132 Sec. 203. Enforcement

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202.

28 C.F.R. Sec. 36.104, (Americans with Disabilities Act) Definitions

...

Service animal means any guide dog, signal dog, or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items.

...

28 C.F.R. Sec. 36.032, (Americans with Disabilities Act) Modifications in policies, practices, or procedures

...

(c) Services animals – (1) General. Generally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.

...

Missouri Title 12, Ch. 213 (Missouri Human Rights Act)

213.65. Discrimination in public accommodations pro hibited, exceptions

1. All persons within the jurisdiction of the state of Missouri

are free and equal and shall be entitled to the full and equal use and enjoyment within this state of any place of public accommodation, as hereinafter defined, without discrimination or segregation on the grounds of race, color, religion, national origin, sex, ancestry, or handicap.

2. It is an unlawful discriminatory practice for any person, directly or indirectly, to refuse, withhold from or deny any other person, or to attempt to refuse, withhold from or deny any other person, any of the accommodations, advantages, facilities, services, or privileges made available in any place of public accommodation, as defined in section 213.010 and this section, or to segregate or discriminate any such person in the use thereof on the grounds of race, color, religion, national origin, sex, ancestry or handicap.

3. [omitted]

***Missouri Title 12, Ch. 209*,kl,**

209.150 Rights of person with visual, hearing or physi cal disabilities –guide, hearing or service dogs, no extra charge for – liability for actual damage

1. Every blind or visually handicapped person, deaf or partially deaf person and physically disabled person shall have the same rights afforded to a fully sighted, hearing, or nondisabled person to the full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities, and other public places.

2. Every blind or visually handicapped person, deaf or partially deaf person, or physically disabled person is entitled to full and equal accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles,

railroad trains, motorbuses, streetcars, boats or any other public conveyances or modes of transportation, hotels, lodging places, places of public accommodation, amusement or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons.

3. Every totally or partially blind or deaf person and every physically disabled person shall have the right to be accompanied by a guide dog, hearing dog, or service, dog, which is especially trained for the purpose, in any of the places listed in subsection 2 of this section without being required to pay an extra charge for the guide dog, hearing dog, or service dog; provided that he shall be liable for any damage done to the premises or facilities by such dog.

4. As used in this section and section 209.10, the term "service dog" means any dog specifically trained to assist a physically disabled person by performing necessary physical tasks which the person cannot perform for himself. Such tasks shall include, but not be limited to, pulling a wheelchair, retrieving items, and carrying supplies.

Missouri Title 12, Ch. 209

209.160 Discrimination or interference with persons having visual, hearing or physical disabilities, a misdemeanor

Any person or persons, firm or corporation, or the agent of any person or person, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities enumerated in section 209.150 or otherwise interferes with the rights of a totally or partially blind or deaf person, or a physically disabled person under section 209.150 shall be guilty of a class B misdemeanor.

STATEMENT OF THE CASE

Marilyn Pona, a person with a degenerative spine and joint disease, must utilize either a wheelchair or the assistance of a certified service dog to move from place to place. She has utilized a service dog since 1985, and, in fact, also gives training classes for service dogs in her city of residence, St. Louis. Ms. Pona has been intensively involved in securing the rights of persons with disabilities in both her home state and nationally, and was involved in the passage of the service dog statute in her home state of Missouri, Rev.Mo.Stat. § 209.150.

On the evening of September 15, 1993, Petitioner had just finished a training class in the use of service dogs and headed, with the assistance of her service dog, Flyer, to a restaurant where she had planned to meet up for dinner with some of the students from this class.

As she entered the restaurant, a Cecil Whittaker's establishment on Grand Avenue in St. Louis, an employee of the restaurant yelled at her from across the room that Petitioner could not bring a dog into the establishment. Petitioner tried to engage in a face-to-face conversation with this employee, but the employee refused. Petitioner then requested that the employee find someone else with whom she could talk. Another employee came out from the back of the restaurant, and Petitioner showed this second employee a copy of the Missouri statute which authorizes the use of service dogs in any place of public accommodation. The first employee read the statute but insisted that Petitioner leave the restaurant. Petitioner indicated that she had a right to stay in the restaurant and suggested that the restaurant call the police so that the police could confirm her right to remain in the restaurant.

Two police officers arrived on the scene after being dispatched, and spoke to both the first employee and to Petitioner. Petitioner showed a copy of the law to the police officers as well. The officers then told the employee of Petitioner's right to remain in the restaurant, and the employee phoned the owner. Over the telephone, the police officers explained the rights of the Petitioner to the owner, and informed the owner of the civil liability that he could incur for violating the plaintiff's rights. But the owner refused to let Petitioner remain in the restaurant, and told the police officers that Petitioner had to leave, as a consequence of Special Order 86-5-31, which they believed prohibited them from enforcing laws protecting people with disabilities from discrimination. According to Petitioner, the police officers then ordered her to leave the premises. Petitioner then left the restaurant.

Special Order 86-5-31 was originated by the chief of poice in an effort to standardize "Public Accommodations Violation Procedures." The Order refers to Chapter 3.44 of the Revised Code of the City of St. Louis, which prohibits discriminatory practices in places of public accommodation. The Order states that

> "Members of this Department shall not take any enforcement action to force compliance with this law. nor shall any member of this Department deter any citizen from proceeding under the conditions of the ordinance on his own initiative."

Special Order 86-5-31 subsequently became applicable to public accommodation violations involving service dogs and to persons claiming rights under Rev.Mo.Stat. § 209.150. Deposition of Major Stephen Pollihan ("Pollihan

depo"), p. 22.

Section 209.150 of the Revised Missouri Statutes provides, in part, that

> "every physically disabled person shall have the right to be accompanied by a guide dog, hearing dog, or service dog, which is especially trained for the purpose, in any [place of public accommodation]."

Rev.Mo.Stat. § 209.150. Section 209.160 provides that any person, firm, or corporation, or any agent thereof, who violates § 209.150 shall be guilty of a class II misdemeanor. Rev.Mo.Stat. § 209.160. According to the Police, Special Order 86-8-31 prohibits police officers from enforcing the criminal provisions of § 209.160, even when there exists a clear violation of the law and the rights of a disabled person using a service dog are clearly being violated. Calcaterra depo, p. 8. Special Order 86-8- 31 does not allow an officer to arrest or threaten to arrest a proprietor who refuses to provide service to an individual because of the presence of a service dog. Pollihan depo, pp. 26-27, 33- Police officers are not to take any enforcement action to force compliance with § 209.150, including making an arrest pursuant to § 209.160. Pollihan depo, p. 28.

On the night that two police officers asked plaintiff to leave Cecil Whittaker's restaurant, Special Order 86-5-31 was in effect. Both officers were aware of 86-5- 31 and attempted to follow the Order by the book. Rodden depo, pp. 33, 35; Calcaterra depo, p. 7, 32. Even though they testified that there was probable cause to believe that plaintiff's rights were being violated, they knew that 86-8-3 1 prohibited them from taking any action to force compliance with the law, and

believed that by arresting or threatening to arrest anyone, their actions would violate 86-5-31. Rodden depo.

Petitioner filed suit in U.S. District Court for the Eastern District of Missouri. Plaintiff claimed violations of Title II of the American with Disabilities Act, 42 U.S.C. § 12131 *et seq.*, 42 U.S.C. § 1983, the Missouri Human Rights Act, Rev.Mo.Stat. § 213.101 *et seq.*, and Missouri statutes specifically codifying the rights of persons to disabilities to service dogs. Rev.Mo.Stat. §§ 209.150 and 209.160.

The District Court, ruling on a summary judgment motion filed by the defendants, dismissed the Petitioner's case. The lower court ruled that the Petitioner had failed to establish a Title II claim because the police action in this case provided by the police or the Board of Police Commissioners was not the kind of activity "which is contemplated by 42 U.S.C. § 12312."

On appeal, two judges of the Eighth Circuit, while disagreeing with each other's reasoning, voted to affirm the judgment of the District Court. Writing for the court – albeit without the agreement of his colleagues, Judge Morris Arnold found that the Board of Police Commissioners had no policy that offended the ADA. The court ruled that, factually, the Special Order under which the police officers acted was not "on its face, an order of the Board." Judge Morris Arnold was skeptical that an implied policy, practice or custom could be identified by Petitioner when only one incident of this nature had been reported to the St. Louis police since 1991.[1]

According to Judge Morris Arnold's opinion,

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[1] The court also affirmed the denial of the Section 1983 claim, ruling that an ADA violation, as a matter of law, is not actionable under Section 1983.

Petitioner's other claim under the Missouri human rights statute was not actionable because, "[i]t was her dog, not Ms. Pona herself, to which the pizzeria employees raised objection." The court thus found that Ms. Pona herself was not denied "accommodations ... made available in any place of public accommodation ... on the grounds of ... handicap." Moreover, the court reiterated its view that there was no Police Department policy interfering with the enforcement of the Missouri statute regarding service animals and thus no violation by the St. Louis police of the statute concerning public accommodations for the handicapped.

Judge Panner, sitting by designation, disagreed with Judge Morris Arnold on each of the above particulars, and agreed with Judge Richard Arnold's dissenting opinion that a Special Order of the police chief was indeed a policy of the Board. Judge Panner reasoned that the members of the Board of Police Commissioners "are the Chief's bosses and they have the power to alter the challenged policy." But addressing the merits of the claim, Judge Panner found that the policy did not violate Title II of the ADA. The concurring judge reasoned that this policy was not

> "targeted solely at persons with disabilities, but includes all incidents concerning these laws, including race, religion and gender. There is a civil enforcement mechanism available, and the police advise individuals of their right to initiate such action."

Thus, the

> "police did not discriminate against plaintiff because she has a disability. They treated her precisely the same as they treat all persons in

that situation, disabled or not."

For this reason, Judge Panner, concurring in judgment, cast the crucial deciding vote denying petitioner's appeal.

Dissenting, Judge Richard Arnold would have held both that the Chief of Police's directive not to enforce applicable anti-discrimination laws was a "policy" of the police department, and that this policy was discriminatory.

In light of the differing reasons expressed by each of the three judges on the Eight Circuit panel, Petitioner filed a suggestion for a rehearing by the Eight Circuit Court of Appeals *en banc*. Although four circuit judges voted in favor of rehearing, the motion was denied by a majority of the Eighth Circuit judges.

REASONS FOR GRANTING THE WRIT

I.

The special order of the police chief clearly was a policy of the police department.

Judge Morris Arnold opinion finding, as a matter of law, that a Special Order created by the St. Louis Chief of Police is not ultimately a policy supervised and maintained by the Board of Police Commissioners is obviously erroneous. Judge Morris Arnold, in the majority opinion, indicates plaintiff did not provide evidence to counter the Board's claim that "it does not issue Special Orders" and thus finds the Board not liable. *Pona*, 155 F.3d at 1037. As dissenting Judge Richard Arnold observed, with Judge Panner's concurrence,

> "to say that a Special Order issued by the Chief in written and published form is not a

> policy of the Police Department seems untenable to me. . . . The Board is allowing the Chief, at least in practice, to make policy."

Id. at 1039-40. Judges Richard Arnold and Panner correctly identify the flaws in Judge Morris Arnold's reasoning.

In *Pembaur v. Cincinnati,* 475 U.S. 469, 483 (1985), the Court observed that

> "municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establishing binding ... policy respecting particular matters and to adjust that policy ... in changing circumstances."

The record in the case contains plenty of evidence that the St. Louis police department operated this way. The order prohibiting police from enforcing anti-discrimination law was treated by the police officers at the scene as police department policy that was to be followed to the letter. (Rodden deposition, pp. 33, 35, and Calcaterra deposition, pp. 7, 32.) Moreover, a witness designated pursuant to Fed.R.Civ.P. 30(b)(6) by the Board of Police Commissioners to speak on their behalf indicated that the Special Order was the policy of the police department and the Board. (Pollihan deposition, p. 21-22).

There was no basis in the record for making dubious distinctions between municipal bodies and those officials with policymaking authority. At a minimum, the evidence submitted that the Chief of Police's Special Order reflected Board should have precluded summary judgment on this issue.

II.

The suggestion that discrimination against a service dog is not also discrimination against people with disabilities is clearly erroneous and must be overturned.

As an alternative ground to reject Ms. Pona's discrimination claims, Judge Morris Arnold reasons that he doubts "the facts would support a finding that Ms. Pona was denied service at the pizzeria 'on the grounds of handicap' " because "[i]t was her dog, not Ms. Pona herself, to which the pizzeria employees raised objections." *Pona,* 155 F.3d at 1038.

The notion that one can separate the service animal from its disabled owner is offensive to the plain language and fundamental purposes of laws protecting people with disabilities from discrimination.

> "[H]andicapped persons and their guide/signal/service dogs are an inseparable working team. [T]hese dogs are essential in allowing handicapped persons to function independently." *See* Pond, *No Dogs Allowed: Hawaii's Quarantine Law Violates the Rights of People with Disabilities,* 29 Loy. L.A.L. Rev. 145, 156 (November 1995). Prior to the passage of laws providing persons with disabilities the right to access public places with service dogs, they experienced great problems attempting to gain access to public places due to misperceptions that service dogs are unsanitary, disruptive or even dangerous. . . ." ."

DuBoff, *Civil Rights for the Blind: Equal Access for Guide Dog Users,* 5 N.Y.L. Sch. J. Human Rts. 1, 9-10 (Fall 1987).[2] The laws represented a legislative judgment, now increasingly recognized by the public as a result of recent experience, that there was no reason to separate service animals from their owners on policy grounds, such as public safety, public health, or public disturbance. *Clark Co. School District v. Buchanan,* 924 P.2d. 716, 718 (Nev. 1996). As the district court in this case recognized, "[m]any barriers to full participation of the disabled work their discriminatory effects due to the auxiliary aids upon which the disabled rely, and not due solely to the disabling impairment." (District Court Opinion, p. 10 n.7, *quoting, Crowder v. Kitagawa,* 81 F.3d 1480, 1484 n.1 (9th Cir. 1996)). Ms. Pona was the victim of precisely the type of treatment that the laws against disability discrimination were designed to prevent.

In Missouri, the matter is settled by statute. Under state statute the "[r]ights of person(s) with visual, hearing or physical disabilities" includes "the right to be accompanied by a guide dog, hearing dog, or service dog, which is especially trained for the purpose . . . specifically trained to assist a physically disabled person by performing necessary physical tasks which the person cannot perform for himself" in all

[2] The author continues:

> "While these restrictions may be quite valid in the case of the average pet or stray, they are inappropriate when applied to guide dogs. Guide dog users scrupulously maintain their dogs to be certain that they are clean, well-groomed and disease free. The dogs selected for guide dog schools are chosen partly for their easily maintained coats. ... During their training these dogs are exposed to a variety of distractions so that their capacity for obedience and attention may be tested before they are assigned to a blind person." *Id.*

"places to which the general public is invited" because this is necessary for these persons to enjoy "full and equal accommodations, advantages, facilities, and privileges of" these places. Rev. Mo. Stat. § 209.150.[3] This fact was so obvious to Missouri's lawmakers that they made violations of this law a crime. Rev. Mo. Stat. § 209.160.

Under federal anti-discrimination law, the ADA regulations state that "the general intent of Congress" was "to ensure that individuals with disabilities are not separated from their service animals." 28 CFR § 36.302 (c)(1), *Appendix to Part 36B -- Preamble to Regulation on Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities,* at 605 (July 26, 1991). In promulgating these regulations, the Department of Justice was simply reiterating the legislative history of the ADA regarding a service dog's role as a necessary and inseparable aid to the disabled person. *Johnson v. Gambrinus Company/Spoetzl Brewery,* 116 F.3d 1052, 1061 n.6 (5th Cir. 1997) (Relying, in part, on statements by the House Labor and Education Committee such as: "A public accommodation which does not allow dogs must modify that rule for a blind person with a

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[3] Missouri's statutory recognition that the service animal and the owner with a disability are indivisible was upheld by the Missouri state court of appeals in *State v. Premier Service Corp.*, 765 S.W.2d 653 (Mo.App. 1989). In that case, the appellate court affirmed a trial court ruling that the defendant corporation, which operated a limousine service from the St. Louis county airport, discriminated against a visually-impaired traveler who had a seeing-eye dog. *765 S.W.2d* at 658. The driver of the van would not allow both the plaintiff and her dog to be seated, and was told by the service's dispatcher that she would have to pay more than the regular fare, to take "her own limousine" with the service animal. *Id.* at 654-55. Interestingly, as in Ms. Pona's case, the victim in *Premier Service* had in her possession a copy of the relevant Missouri statute prohibiting discrimination against the visually-impaired because "she had previously encountered resistance to her boarding an airport limousine with her guide dog at Lambert Airport." *Id.*

seeing-eye dog, a deaf person with hearing-ear dog, or a person with some other disability who uses a service animal. Refusing to admit the dog in these circumstances is tantamount to refusing to admit the person who is in need of the dog."[4]).

In view of the legislation, regulations, legislative history, and public policy considerations in this area, the courts (especially in Missouri) should by now have achieved consensus on the principle that service animal cannot be considered separately under anti-discrimination law from the person with a disability who is served by the animal. The Fifth Circuit recognized this principle in *Johnson*, *supra*, in the context of public accommodations, as did the Ninth Circuit in *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996), in the context of public services.[5] This is also the overwhelming

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[4] The court also indicated that the Senate Judiciary Committee specifically listed a change in a "no pets" policy as a "reasonable accommodation." The court cited "similar sentiments" from Senator Paul Simon, as quoted in the *Congressional Record*:

> "A person with a disability and his or her assistive animal function as a unit and should never be involuntarily separated. Nor is there any need for separation. To require it would be discriminatory under the Americans with Disabilities Act."

Id. at 1061, n.6.

[5] In *Crowder* the Court of Appeals noted that although Hawaii's dog quarantine laws appeared to apply "equally to all entering the state with a dog, its enforcement burdens visually-impaired persons in a manner different and greater than it burdens others. *Id.* at 1484. The appellate court did not find responsive the assertion that "the visually-impaired, like anyone else, can leave their dogs in quarantine and enjoy the public services they desire." *Id.* at 1485. The appeals panel found that Hawaii's dog quarantine for rabies discriminates against the visually impaired "by denying them meaningful access to state services, programs and activities by reason of their disability in violation of the ADA." *Id.* at 1485.

assumption that has led to numerous settlements achieved by the Department of Justice in numerous circuits since the ADA became law,[6] as well as official literature on compliance with the ADA.[7]

Unfortunately, Judge O'Scannlain's dissenting opinion in *Crowder* fractured this consensus by arguing that

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[6] *See, e.g., Enforcing the ADA: A Status Report from the Department of Justice,* Issues: April 1994, April-June 1994, April-September 1995, October 1995-March 1996, April 1996 - June 1996, July-September 1996, October-December 1996, April-June 1997, July-September 1997, October-December 1997, January-March 1998, April-June 1998. In addition to the settlement in *Crowder, see In the United States Court for the District of Hawaii, Crowder v. Nakatani,* Civil No. 93-0021213DAE, April 7, 1997, these settlements require rental car companies to allow guide dogs to accompany blind passengers on its airport shuttle buses; *Settlement Agreement under the Americans with Disabilities Act of 1990 Between the United States of America and Budget Rent a Car Systems, Inc.* (For Complaints) DJ 202-79-16, 202-79-42 and 202-79-50; overturn company policies of not transporting any service animals except for seeing-eye dogs; *Settlement Agreement under the Americans with Disabilities Act of 1990 Between the United States of America and Skyway Group, Inc. d/b/a Arizona Shuttle Service, Tucson, Arizona,* DJ 202-8-36; and require restaurant chains to make clear to franchise owners that "restaurants that otherwise prohibit pets must allow entrance to service animals." *Settlement Agreement Regarding Access for Individuals with Disabilities to Wendy's Restaurants,* re: accessibility to customer queue areas.

[7] Repeatedly, in Department of Justice public education literature for businesses generally (See *Commonly Asked Questions about Service Animals in Places of Business,* July 1996. This is a document specifically endorsed by the Attorney General of Missouri and 23 other state attorneys general in a cover letter from Deval Patrick, Assistant U.S. Attorney General for Civil Rights, and Scott Harshbarger, President of the National Association of Attorneys General, July 26, 1996.), small businesses (*ADA Guide for Small Businesses*), and for child day-care centers (*Commonly Asked Questions About Child Care Centers and the Americans with Disabilities Act*), the Justice Department has affirmed both that a service animal "is not a pet" and that it cannot be denied admittance to a place of public accommodation.

persons depending on service animals are members of a different class than the more general class of persons who are blind, or otherwise disabled. 81 F.3d at 1490. According to Judge O'Scannlain, only the latter classes are protected by federal anti-discrimination law. *Id.* Though less carefully reasoned, the Eighth Circuit's decision in *Pona* has adopted the flawed logic of the *Crowder* dissent. 155 F.3d at 1038. The Court should accept this case on Writ of Certiorari, not only to rectify the Eighth Circuit's obvious mistake in law, but to resolve the conflict between the Eighth Circuit on the one hand and the Fifth and Ninth Circuits on the other.

III.

Defendants' policy refusing to enforce state laws prohibiting discrimination against people with disabilities is discriminatory.

A. No defense to discrimination is created when a policy equally discriminates against all classes of persons protected by anti-discrimination laws.

In some respects, the concurring opinion contains the most important portion of the decision in this case. Two out of three of the Eighth Circuit judges (the concurrence and the dissent) were in disagreement with the "court's" holding that the Special Order promulgated by the Police Chief of the city of St. Louis was indeed an official policy of the Board of Police Commissioners. Judges Panner and Richard Arnold also seem to take mild exception with Morris Arnold's finding that excluding service animals from places of public accommodation is, at worst, discrimination against dogs. But for a remarkable leap of legal reasoning in the concurrence, the outcome of this case would have been different:

Judge Panner held that since the police do not enforce anyone's rights against discrimination in a place of public accommodation, the policy is not discriminatory. This policy was not "targeted solely at persons with disabilities, but includes all incidents concerning these laws, including race, religion and gender. . . . The police did not discriminate against plaintiff because she has a disability. They treated her precisely the same as they treat all persons in that situation, disabled or not." *Id.* at 1039. Thus, according to Judge Panner, a policy that discriminates against more than one protected class is in effect, not discriminatory.

Napoleon is said once to have remarked: "from the sublime to the ridiculous is but a step." Before attacking the logic behind the final step taken in reaching the above conclusion, the Court should recognize that a good many of the steps taken before the last one in the concurring opinion were indeed sublime. Judge Panner's concurrence avoided the mistakes criticized in Parts I and II of this Petition, and it correctly assumes that if the Chief of Police's policy would have refused to enforce only those laws that protect people with disabilities, the policy would have been discriminatory.

Although the concurrence's discussion about discrimination creates an illusion of internal inductive rationality, this quickly dissolves when one directs one's attention back to the purpose of the laws that are being interpreted here. To assist in this teleological exercise, it may be helpful to consider this humble example: A hypothetical municipality has elected a slate of officials who are firm believers in the doctrine of a hypothetical organization we shall call the New Knights of Know-nothing Knuckle-headedness [hereinafter the new KKK]. Among other planks, the new KKK's doctrine firmly opposes recognizing the rights of people with disabilities, believing that disabilities are one of many signs of

genetic inferiority, and that social Darwinism should be allowed to take its course. Not wishing to have to accommodate such individuals, the new KKK officials have adopted a strict policy of refusing all police and other protective services to persons in this class.

When this policy is attacked under Title II of the Americans with Disabilities Act, and the Missouri Human Rights Act, the new KKK officials assert their innocence. Citing Judge Panner's decision, they point out that new KKK policies apply equally to all others they consider social degenerates, such as blacks, persons of other than U.S. national origin, Jews, and women. "We do not discriminate," they boldly argue, "because we are equal opportunity discriminators."

This example may seem absurd, but it only appears this way because of the flaws in Judge Panner's argument: The new KKK can assert that it does not discriminate because it believes that discrimination is disproved when one compares their treatment of persons with disabilities with other persons who are members of protected classes. But this is not the relevant comparison: whether a policy is discriminatory must be judged by comparing its effect on the class in question (i.e. persons with disabilities) against the population as a whole, not against other protected classes. "In other words, discrimination is a failure to treat all persons equally where no reasonable distinction can be drawn between those favored and those not favored." *Zamlen v. City of Cleveland*, 686 F. Supp. 631, 652 (N.D. Ohio 1988). Surely the lawmakers who approved the Civil Rights Act of 1964, the Rehabilitation Act, ADA, the Age Discrimination in Employment Act and the like recognized that prejudice, bigotry and jingoism are not usually found in isolation, but that racism, sexism, xenophobia and morbidiphobia often derive from the same

mindsets and ideologies. *See* J.D. Armour, "Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes," 46 Stan.L.Rev. 781, 784-85 (April 1994). Surely Congress could not have intended that discrimination against one protected group would excuse discrimination against another.

The Court has previously held that it is unlawful to discriminate against a class of persons even though persons who are not members of that class may also be affected. In *Hunter v. Underwood*, 471 U.S. 222, 232 (1985), the Supreme Court found that an additional purpose to discriminate against poor whites in a voting statute did not prevent a finding of discrimination against poor blacks who were the primary intended target of this statute. In *Hunter v. Erickson*, 393 U.S. 385 (1968), the Court similarly found that an ordinance at issue, which prevented the enactment of any statutes concerning discrimination in housing statutes without approval by the majority of voters in the city, "draws no distinctions among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements ..." *Id.* at 390. Nevertheless, the Court found that "although the law on its face treats Negro and white, Jew and Gentile in an identical manner, the reality is that the law's impact falls on the minority. The majority needs no protection against discrimination ..." *Id.* at 391.

These principles have been followed in numerous lower court cases, which have held that a policy which discriminates against people with disabilities is no less illegal because it may "catch within its net" other people who are not members of protected classes, such as juvenile group home residents, and ex-criminal offenders. *See, e.g, Horizon House v. Township of Upper Southhampton*, 804 F.Supp. 683, 694 (E.D.Pa. 1992). It is also embodied in a series of cases

holding that it is illegal to discriminate against persons based on their membership in more than one protected class. *Lam v. University of Hawaii*, 40 F.3d 1551, 1562 (9th Cir. 1994) (unlawful to discriminate against Asian women, even if no discrimination against Asians or women generally); *Jeffries v. Harris County Community Action Ass'n*, 615 F.2d 1025, 1034 (5th Cir. 1980) (unlawful to discriminate against persons who are members of multiple classes protected under Title VII); *McGrenaghan v. St. Denis School*, 979 F. Supp. 323, 327 (E.D.Pa. 1997) (unlawful to discriminate against women with disabled children, even if no discrimination against women generally); *Smith v. City Elyria,* 857 F.Supp. 1203, 1212 (N.D. Ohio 1994) (finding cause of action for discrimination on basis of sex and status as victim of domestic abuse because "there is evidence in the record that the Elyria police department treated domestic disputes differently than non-domestic disputes.[8] The [police policy

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[8] As a commentator observed in light of a similar case regarding the impact of police discrimination against female victims of spousal abuse, *Thurman v. City of Torrington,* 595 F.Supp. 1521 (D. Conn. 1984):

> "The archaic social attitudes and negative stereotypes have persisted, however, weakening the practical effect of present laws [outlawing spousal abuse as a crime]. ... Police responses reflect society's attitude that spousal abuse is less serious than violence between strangers and that intervention in domestic disputes is thus a waste of police time and resources. . . . The tendency to treat spousal abuse differently than traditional criminal behavior has reinforced the notion that assaulting one's wife is not really a crime and is therefore somehow normal and acceptable."

Comment, *Gender Based Discrimination in Police Reluctance to Respond to Domestic Assault Complaints,* 75 Geo. L.J. 667, 672-72 (1986).

Similarly, Judge Panner's concurrence could be construed that a civil rights public-accommodation discrimination, regardless of the kind

document] expressly treats these situations differently."); *Arnett v. Aspin*, 846 F. Supp. 1234, 1238-40 (E.D.Pa. 1994) (unlawful to discriminate against older women, even if no age or gender discrimination generally).

Even if the laws that the Board refused to enforce benefited all protected classes equally, it could be discriminatory not to enforce them if this policy unfairly disadvantaged any protected class as compared to the population as a whole. In this case, the only laws that the Board has created a "Special Order" preventing enforcement are those which benefit classes that are historically oppressed. Other groups that are protected by law, such as homeowners, shopkeepers, pedestrians, motorists, protestors, hunters, preachers and teachers -- all can count on non-discriminatory enforcement of the laws that protect them. The Board has not explained why anti-discrimination laws only -- and only the people they protect -- deserve such "special" treatment.

B. The only criminal laws which the police will not enforce as a matter of policy are those which protect people with disabilities. This is the essence of discrimination.

Judge Panner also erred in considering all of the anti-

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of person being discriminated against, is less important than other crimes involving these persons.

> "What police do have is a policy of not taking sides in disputes concerning discrimination in public accommodation, preferring to let those matters be handled through civil proceedings. This is not a policy targeted solely at persons with disabilities, but includes all incidents concerning these [public accommodation discrimination] laws, including race, religion and gender."

155 F.3d at 1039.

discrimination laws en masse. There is a significant distinction between Chapter 3.44 of the Revised Code of the City of St. Louis and Rev.Mo.Stat. § 209.150. Unlike the city ordinance, violation of Rev.Mo.Stat. § 209.150 constitutes a class B misdemeanor. See Rev.Mo.Stat. § 209.160. While it is not a crime in the state of Missouri for a place of public accommodation to deny services to a person on the basis of race, color, national origin, religion. or gender it is a crime for a place of public accommodation to deny services to a person on the basis of their disability or use of a service dog. The police are not expected to take sides when a civil dispute arises. However, the police are expected to take sides when a criminal act is involved. By refusing to take any action when a violation of Rev.Mo.Stat. § 209.150 occurs, the Board treats disabled persons differently than non-disabled persons because disabled persons are the only class of persons that are denied the Board's services in enforcing a criminal law.

In his opinion, Judge Panner ignored the fact that the only criminal laws that the Board is refusing to enforce are those protecting persons with disabilities. Rev.Mo.Stat. § 209.160.[9] App. 227 and 236. Officer Michael Calcaterra, who was one of the police officers involved in the incident with plaintiff, testified that he does not know of any other criminal laws that police officers in the City of St. Louis are instructed not to take any action to enforce. App. 227-28.

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[9] In fact, the Board's policy would probably also apply to other Human Rights protections, such as Mo.Rev. Stat. 209.265, which makes it a misdemeanor to disclose of the contents of a conversation by a interpreter for the deaf. The implications of this are quite simple to discern: hearing people have the right to have the privacy of their communications protected by criminal law, but the deaf do not. Whether the Board policy would also prevent enforcement of Rev.Mo.Stat. 577.161, which criminalizes the refusal of swimming pools to allow persons with disabilities to use life jackets, is unclear.

This Court has recognized that discriminatory enforcement of criminal law can deprive persons of equal protection of laws. As the Court explained in *McCoy v. Court of Appeals of Wisconsin*, "[a] state's enforcement of its criminal laws must comply with principles of substantial equity and fair procedure. . . ." 486 U.S. 429, 435 (1988). In *Romer v. Evans*, this Court opined that "a law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." 517 U.S. 620, 633 (1996). The district court opines that "[t]hese principles are embodied in the Fourteenth Amendment, not the ADA." (District Court Opinion, n.8). Petitioner can see no basis to distinguish between the Fourteenth Amendment's requirement that criminal laws be enforced equitably, and the principles in the ADA's prohibition against "discrimination" and "exclu[sion] from participation in or [denial of] the benefits of the services, programs, or activities of a public entity. . . ." 42 U.S.C. § 12132.

Judge Panner seems to excuse the Board's differing treatment of the criminal laws prohibiting discrimination against persons with disabilities in another way: he asserts "there is a civil enforcement mechanism available." 155 F.3d at 1039. However, this observation would apply to many, if not most of the criminal laws: For example, the crime of removing a gravestone, Mo. Rev. Stat. § 214.455, Mo. Rev. Stat. § 214.131, may be addressed through common law and statutory actions for trespass and conversion. Rev.Mo.Stat. § 537.330 to § 537.340. Crimes involving stealing cable service, tampering with computer data, writing bad checks, and putting slugs in vending machines, enjoy their own statutory civil remedies. Rev.Mo.Stat. § 537.123; Rev.Mo.Stat. § 537.525; Rev.Mo.Stat. § 570.300; Rev.Mo.Stat. § 578.445. Interference with hunting, fishing, and trapping has both civil,

Rev.Mo.Stat. § 537.524, and criminal, Rev.Mo.Stat. § 578.151 to § 578.152, implications specifically prescribed by statute. In fact, Missouri has made a number of wrongful acts commonly addressed through actions in the nature of contract or tort, into crimes. *See, e.g.*, Rev.Mo.Stat. § 570.160 (false advertising); Rev.Mo.Stat. § 570.140 (deceptive business practices); Rev.Mo.Stat. § 565.130 (false imprisonment); Rev.Mo.Stat. § 565.070 (tortuous assault); Rev.Mo.Stat. § 578.150 (failing to return rented property).

The Board has not created any general limitations on police powers to investigate and prosecute crimes for which there may also be a civil enforcement mechanism, but has focused only on crimes against people with disabilities. No matter how egregious the violation, police officers are simply not allowed to take any action to protect the rights of persons with disabilities in places of public accommodation. On that basis alone, the Board's policy is discriminatory. The Board denies police services to a class of persons by refusing to enforce a criminal law enacted for their protection, but provides those same services to all other persons who have had a crime committed against them. There is no reasonable basis for the Board to distinguish between the laws protecting persons with disabilities, and other laws, which the police will enforce even though there is a civil remedy. [10]

[10] Judge Panner also failed to recognize is that Special Order 86-5-31, as originally issued by the St. Louis Chief of Police, did not apply to public accommodation disputes involving disabled persons. In fact, Rev.Mo.Stat. §§ 209.150 and 209.160 did not even apply to physically disabled persons until 1988, two years after Special Order 86-S-31 was issued. At some point subsequent to the issuance of Special Order 86-5-31, the Board made a conscious decision to extend the parameters of the Special Order to include disputes involving Rev.Mo.Stat. § 209.150. That decision, which singled out disabled persons, plainly creates claims under Title II of the ADA and the MHRA. The only state laws that the Board has chosen not to enforce is a law that protects one class of persons -- persons with disabilities. Clearly, the Board's policy does not treat everyone

C. The Special Order of the Police Department is in violation of law because of its disparate impact on people with disabilities, and because it denies them meaningful access to the benefits of laws, and to public accommodations.

There is a significant post-script to the above observations: as has already been noted a genuine factual dispute exists as to whether the police ordered Ms. Pona and her dog from the restaurant following their realization that they could not to enforce the criminal ordinance. For the purposes of a summary judgment motion, we must assume Ms. Pona's account to be true. Unable to tell the restaurant owner that he must allow the dog to remain, the police found themselves in the center of an active conflict between merchants and a private citizen defending her rights. A potential "breach of the peace" situation had developed. To resolve the situation, they probably did the only thing that they felt the policy allowed them to do.

Now Ms. Pona, the victim of discrimination in this case found herself on the receiving end of police enforcement. Had she refused to obey the police, she could herself have been subject to arrest. The police were forced to enforce the restaurant's discriminatory policy. By "not taking sides" they became the de facto agents of the scofflaws who ran the public accommodation.

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equally because, unlike other classes of persons, the Board has specifically targeted people with disabilities. Thus it was simply incorrect for Judge Panner to have found that the Board's policy is not "targeted solely at persons with disabilities, but includes all incidents concerning (the public accommodation) laws, including religion, and gender." 155 F.3d at 1039. Judge Panner's statement is also inaccurate in that neither the city ordinance nor Special Order 86-5-31 refers to public accommodation disputes involving gender.

Of course, there is no evidence that the St. Louis Board of Police Commissioners, as a matter of policy, espouse the ideology of the new KKK. But such ideologies were not the prime focus of what lawmakers sought to address through the ADA, the Rehabilitation Act, and the like. "Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference -- of benign neglect." *Alexander v. Choate*, 469 U.S. 287, 295 (1985). Thus, it makes no difference, for the purposes of this Petition, that in promulgating its special order, the St. Louis police department may not have set out to discriminate against any group -- people with disabilities included. While Judge Panner seems to have been thinking about discriminatory animus, in order to make a prima facie case of discrimination, all that is required is to show "disparate impact" (i.e. that the policy, even if it facially neutral, would unfairly disadvantage people with disabilities, as compared to the population as a whole). *Hunter v. Erickson,* 393 U.S. at 391.

Alternatively, in the context of Title II of the ADA, the person with the disability can prevail if they can show that they were deprived of "meaningful access" to public benefits, programs or services. *Alexander v. Choate*, 469 U.S. at 302; *Crowder*, 81 F.3d at 1484. *See also* 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."). In this respect, laws protecting people with disabilities differ fundamentally from other anti-discrimination laws. Under the ADA, and the Missouri statutes at issue in this case "discrimination may be shown precisely where the defendant treated the plaintiff *the same* as everyone around her despite her need for reasonable accommodation." *Dunlap v.*

Association of Bay Area Governments, 996 F.Supp. 962, 966 (N.D. Cal. 1998).

The concurrence ignores all this, asserting that because people with disabilities are treated the same as persons who are members of other protected classes, no discrimination took place. Even if the premise were true (and it is not) the effect of the Board's policy was that Ms. Pona was denied meaningful access, both to a public place, and to the benefits of a criminal law that was designed to protect her rights. The failure of the police to enforce these laws plainly has a disparate impact on people with disabilities because it only prevents them from obtaining the protection of criminal laws, and prevents them from vindicating their right to equal access to public accommodations. The practical effect of police believing that they may not enforce these laws means that they usually will be placed in the uncomfortable position of helping public accommodations to violate them.

CONCLUSION

For the reasons cited above, Petitioner respectfully requests this Honorable Court to grant writ of certiorari in this case.

Dated this 23 day of March, 1999.

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Marilyn Pona, Appellant, v. Cecil Whittaker's, Inc., Appellee, and C. W. Central Westend, Inc.; Eye's Enterprises, Inc.; Paul Lia, as Trustee of Eye Enterprises, Inc.; Ralph Lia, as Trustee of Eye Enterprises, Inc.; Jim Craddock, as Trustee of Eye's Enterprises, Inc.; Paul Lia, In His Individual Capacity; Ralph Lia, In His Individual Capacity; Jim Craddock, In His Individual Capacity, Defendants, and St. Louis Board of Police Commissioners; Ann Marie Clarke, Member of the City of St. Louis Board of Police Commissioners; Mathew J. Padberg, Member of the City of St. Louis Board of Police Commissioners; Robert Haar, Member of the City of St. Louis Board of Police Commissioners; Freeman Bosley, Jr., Member of the City of St. Louis Board of Police Commissioners; Charles Mischeaux, Member of the City of St. Louis Board of Police Commissioners; Michael Calcaterra, In His Individual Capacity and as a Police Officer for the City of St. Louis; Matthew Rodden, In His Individual Capacity and as a Police Officer for the City of St. Louis; and Joseph W. Robinson, In His Individual Capacity and as a Police Officer for the City of St. Louis, Appellees.

No. 97-3387

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

June 10, 1998, Submitted
September 18, 1998, Filed

COUNSEL: Counsel who presented argument on behalf of the appellant was Jerome J. Dobson of St. Louis, Missouri.

Jonathan C. Berns and Gregory A. Rich appeared on the brief.

Counsel who presented argument on behalf of the appellee, Cecil Whittakers, was Louis Gilden of St. Louis, Missouri. Counsel who presented oral argument on behalf of the appellees Anne-Marie Clarke, et al. was Judith A. Ronzio of St. Louis, Missouri.

JUDGES: Before RICHARD S. ARNOLD and MORRIS SHEPPARD ARNOLD, Circuit Judges, and PANNER, n1 District Judge. OWEN M. PANNER, District Judge, concurring in part and concurring in the judgment. RICHARD S. ARNOLD, Circuit Judge, concurring in part and dissenting in part.

OPINIONBY: MORRIS SHEPPARD ARNOLD

OPINION:

MORRIS SHEPPARD ARNOLD, Circuit Judge.

After the employees of a Cecil Whittaker's Pizzeria asked Marilyn Pona to leave their premises because she had a service dog with her, Ms. Pona, who suffers from degenerative spine and joint disease, filed suit, laying claims under the Americans with Disabilities Act ("ADA"), see 42 U.S.C. §§ 12101-12213, 42 U.S.C. § 1983, and the Missouri Human Rights Act (MIRA), see Mo. Rev. Stat. §§ 213.010-213.137. The district court granted summary judgment in favor of two of the sets of defendants, and Ms. Pona appeals. We affirm the judgment of the district court. n2

I.

One of Ms. Pona's complaints against Cecil Whittaker's, Inc. (CW), was that it violated Title III of the ADA, see 42 U.S.C. § 12182(a), which provides that no one "who owns, leases (or leases to), or operates a place of public accommodation" may discriminate against anyone "on the basis of disability in the full and equal enjoyment of ... any place of public accommodation." CW maintains that, as the franchisor of the pizzeria, it did not own, lease, or operate the pizzeria, and therefore cannot be liable under the ADA. The district court agreed with CW, and so do I.

It is undisputed that CW was only a franchisor, and that under its franchise agreement it reserved no right to control entry to the pizzeria. Ms. Pona produced evidence in the district court, however, that the pizzeria's manager telephoned Donald Glenn, the president of CW, and asked him whether Ms. Pona's dog should be allowed on the premises, and that Mr. Glenn told the manager that he "wouldn't have any animals in [his] restaurant" because it "doesn't look good for the franchise." Ms. Pona asserts that in making this statement Mr. Glenn sufficiently insinuated himself into the matter to make CW liable for her exclusion from the restaurant. Mr. Glenn denies that he made any such statement, but, for summary judgment purposes, we are of course obligated to assume that he did.

Even assuming that Mr. Glenn did what Ms. Pona alleged, I believe that summary judgment in CW's favor was appropriate. The fact, if it is one, that Mr. Glenn gave advice to the pizzeria manager and that the manager took it does not establish that CW owned, leased, or operated the pizzeria within the meaning of the ADA. The fact that Mr. Glenn influenced the manager's action is not, to my mind, enough. He had no right to control the manager's actions in any relevant respect, and, absent any such right, no violation of

the ADA appears. Cf. Neff v. American Dairy Queen Corp., 58 F.3d 1063, 1066-69 (5th Cir. 1995), cert. denied, 516 U.S. 1045, 133 L. Ed. 2d 660, 116 S. Ct. 704 (1996).

Ms. Pona also argues that the pizzeria had apparent authority to act on behalf of CW, and therefore that the law of agency imputes the manager's act to CW. As the district eourt recognized, this argument is entirely without merit. The question of CW's liability under Title III of the ADA depends on its actual connection to the premises, not on Ms. Pona's belief about that relationship. Besides, the mere fact that a franchisor's sign appears on a building and the employees within that building wear uniforms bearing the franchisor's logo and insignia does not clothe a franchisee with the apparent power to act on the franchisor's behalf in anything approaching a general way. Nothing in the record, moreover, would indicate that CW did anything to give customers the impression that it controlled access to the building. Nor can Ms. Pona show that she relied on any such impression. See Wilson v. United States, 989 F.2d 953, 959 (8th Cir. 1993).

Ms. Pona's Title III claim against the St. Louis police officers, based on the fact that they asked her to leave the pizzeria, is even more obviously infirm, because there is not a colorable claim that the officers owned, leased, or operated the pizzeria in question. The claim therefore necessarily fails on its face.

II.

Ms. Pona contends that the Board of Police Commissioners of the City of St. Louis (Board) has in place a policy that denies a right secured to her by Title II of the ADA, see 42 U.S.C. § 12132, which makes it illegal for a public entity to exclude a qualified person with a disability "from participation in ... the services ... of a public entity." She

bases her claim on her assertion that when St. Louis police officers arrived to mediate the dispute between her and the pizzeria employees, they refused to explain to the employees that Mo. Rev. Stat. § 209.150 gave Ms. Pona the right "to be accompanied by ... a service dog" in "places of public accommodation"; instead, Ms. Pona alleges, the officers simply informed her of her civil remedies and asked her to leave. They did so, Ms. Pona maintains, pursuant to what she characterizes as a Board policy, namely, Special Order 86-S-31, which, she asserts, prohibits members of the St. Louis Police Department from "taking any enforcement action" with respect to § 209.150. This policy, Ms. Pona claims, violates the ADA because it denies her "the services ... of a public entity," see 42 U.S.C. § 12132.

I leave to another day the question of whether such a policy might violate the ADA, because I believe that the district court correctly held that the Board did not promulgate the policy that Ms. Pona says offends the ADA. The policy is, on its face, not an order of the Board. The Board has the authority to issue General Orders, but Special Orders are the exclusive province of the Chief of Police. See St. Louis Police Manual § 1.030, § 1.031(a), § 1.503. As the district court pointed out in its opinion, "it is undisputed that the individuals comprising the Board of Police Commissioners did not draft, issue, approve or otherwise authorize the Special Order." Ms. Pona states in her brief that "the evidence clearly shows that the Board has at least approved Special Order 86-S-31," but she directs our attention to no such evidence, and, moreover, she cites no authority that would undermine the Board's position that it does not issue Special Orders. The Board's witnesses did opine that the Special Order applied to § 209.150 violations (more on this later), but this has no bearing on the question of the source of the Order.

Even if the Board could be liable for Special Orders issued by the police chief, on the ground, for instance, that with respect to these the chief is in some respects the Board's delegated policy-maker (an argument that Ms. Pona does not advance), her argument would nevertheless fail. Her claim is that the policy denied her the protection of § 209.150, when, on its face, the Special Order speaks only of violations of § 3.44 of the Revised Code of the City of St. Louis, which prohibits discrimination on account of "disability ... with respect to the uses, services and enjoyment of a place of public accommodation." The Order nowhere mentions the similar provisions of § 209.150. The Order, therefore, does not apply to those provisions as a matter of law, and the testimony alluded to above cannot undo that legal fact. That testimony is nothing more nor less than a mistaken statement of law and cannot, despite Ms. Pona's vigorous argument to the contrary, be made somehow to bind the Board.

If there had been testimony that the Order was customarily understood as applying to § 209.150, or if there had been evidence that there were other occasions on which the Order had actually been applied to § 209.150, then perhaps there would have been proof of a policy, practice, or custom sufficient to survive summary judgment. But that is not the state of the record. The absence of such evidence is, on reflection, hardly surprising. Complaints about the exclusion of service dogs from places of public accommodation must surely, as a practical matter, not be numerous, both because service dogs are comparatively rare and because proprietors will hardly ever be so callous as to exclude them. Evidence of the kind of custom that would give rise to a claim like the one that Ms. Pona makes here would therefore be virtually impossible to come by.

Ms. Pona's arguments with respect to Title II of the ADA and the Board therefore fail, and I would affirm the district court's grant of summary judgment on that claim.

III.

Ms. Pona's complaint contained a count against the Board seeking a remedy under 42 U.S.C. § 1983 for the violation of the ADA that I have just disposed of. Because the ADA claim fails, the § 1983 claim based on it necessarily falls with it.

I believe, moreover, that even if the ADA claim had survived, we would have been obligated to affirm the district court's summary judgment against Ms. Pona on the § 1983 claim, because an ADA violation is not actionable under § 1983 in any case. While that provision, of course, can, in proper circumstances, be used to vindicate the denial of rights secured by statutes of the United States, we must be mindful of the principle that if the statutory right that a plaintiff seeks to vindicate comes outfitted with its own comprehensive remedial apparatus, a § 1983 action based on a violation of that statutory right will not lie. That is because we are to presume that Congress intended that the enforcement mechanism provided in the statute be exclusive. See, e.g., DeYoung v. Patten, 898 F.2d 628, 634-35 (8th Cir. 1990).

I note that while the EEOC plays no role in the enforcement of Title II of the ADA, Congress has provided that title with detailed means of enforcement that it imported from Title VII of the Civil Rights Act of 1964, see 42 U.S.C. § 12133, 29 U.S.C. § 794a(a)(1), see also 42 U.S.C. § 2000e-5, § 2000e-16, including giving a right to the person aggrieved, see 42 U.S.C. § 2000e-5(f)(1), § 2000e-16(c), or, in appropriate cases, to the Attorney General of the United States, see 42 U.S.C. § 2000e- 5(f)(1), to bring a civil action.

The ADA, moreover, directs the Attorney General to promulgate regulations implementing Title II. See 42 U.S.C. § 12134(a).

In these circumstances, I think that Congress has, under the applicable legal principles, rather clearly indicated an intention to make the remedies that Title II itself gives the exclusive ones for the enforcement of that subchapter. Indeed, we have already so held. See Davis v. Francis Howell School District, 104 F.3d 204, 206 (8th Cir. 1997). The Eleventh Circuit subsequently reached the same conclusion in Holbrook v. City of Alpharetta, Georgia, 112 F.3d 1522, 1530-31 (11th Cir. 1997), and I believe correctly so.

Ms. Pona also seeks redress under § 1983 for the acts that she laid as a Title III violation against the St. Louis police officers. Since, as I have said, that claim failed as a matter of law, its restatement as a § 1983 claim necessarily fails also. I intimate no view on the question of whether Title III violations can ever form the basis for a cause of action under § 1983.

IV.

Ms. Pona's final claim is that CW, the Board, and the St. Louis police officers violated the MHRA, which makes it unlawful to "deny any ... person ... any of the accommodations ... made available in any place of public accommodation ... on the grounds of ... handicap." See Mo. Rev. Stat. § 213.065.2. In the first place, I doubt that the facts would support a finding that Ms. Pona was denied service at the pizzeria "on the grounds of ... handicap." It was her dog, not Ms. Pona herself, to which the pizzeria employees raised objection. Passing over that point, however, I believe, for the reasons already indicated, that CW did not deny Ms. Pona

anything, because, as I have said, it had no right to control the premises under the franchise arrangement.

Ms. Pona asserts in her brief that the gravamen of her complaint against the Board and the police officers is that it was the Board's policy of refusing to force compliance with § 209.150 that denied her the services of a place of public accommodation and thus violated § 213.065.2. Since I have already held that there was no such policy, I would affirm the judgment of the district court on this count without addressing the specific reasons that the district court advanced in support of that judgment.

V.

For the reasons given, I would affirm the judgment of the district court.

CONCUR BY: OWEN M. PANNER (In Part); RICHARD S. ARNOLD (In Part)

CONCUR: OWEN M. PANNER, District Judge, concurring in part and concurring in the judgment.

I agree that plaintiff's claims against the franchisor and the individual police officers under Title III of the Americans with Disabilities Act ("ADA") must be dismissed for the reasons cited by Judge Morris Arnold. In addition, I note that in a civil action under Title III of the ADA, a private plaintiff can obtain only injunctive relief, not the compensatory and punitive damages that plaintiff seeks. See 42 U.S.C. § 12188(a).

I also agree that plaintiff has failed to state a claim under 42 U.S.C. § 1983. In my view, violations of Title II and Title III

of the ADA are not cognizable as § 1983 claims. To hold otherwise would disrupt the statutory scheme enacted by Congress which explicitly limits the remedies available for violations of the ADA.

I would affirm the dismissal of plaintiff's claims against the members of the Board of Police Commissioners under Title II of the ADA, though not for the reasons stated by the district court. The police officers who asked plaintiff to leave the restaurant, and Major Pollihan, who was designated to represent the Board of Police Commissioners, all testified that they understood Special Order 86-S-31 applied not only to violations of the city ordinance but also to enforcement of the state law. For purposes of opposing a motion for summary judgment, that is sufficient to carry the day. Although the challenged Special Order was issued by the Police Chief, while the defendants are members of the Board of Police Commissioners, the defendants are the Chief's bosses and they have the power to alter the challenged policy. That is sufficient since, as I read Title II of the ADA and its cross-references to 29 U.S.C. § 794a, the only remedy available to plaintiff in this circumstance is equitable relief. Therefore, I agree with Judge Richard Arnold that we must address the merits.

Unlike Judge Richard Arnold, however, I would hold that this policy does not violate Title II of the ADA. The policy does not refuse service to persons with disabilities. If a disabled individual calls to report a burglary, stolen car, or loud party, the police handle the call no differently than they would handle a call from any other citizen. What the police do have is a policy of not taking sides in disputes concerning discrimination in public accommodations, preferring to let those matters be handled through civil proceedings. This is not a policy targeted solely at persons with disabilities, but

includes all incidents concerning these laws, including race, religion, and gender. There is a civil enforcement mechanism available, and the police advise individuals of their right to initiate such action.

The police did not discriminate against plaintiff because she has a disability. They treated her precisely the same as they treat all persons in that situation, disabled or not. Nor is this a case where the police denied plaintiff a reasonable accommodation that would let her enjoy the same public services as other citizens. Summary judgment should be granted for defendants on this claim, albeit not for the reasons articulated by the trial court.

Finally, I respectfully disagree with the suggestion that denial of services on account of plaintiff's service dog was not denial of services on account of her disability. Nevertheless, I agree that the state law claim should be dismissed.

I concur in the judgment affirming the dismissal of this action.

DISSENTBY: RICHARD S. ARNOLD (In Part)

DISSENT: RICHARD S. ARNOLD, Circuit Judge, concurring in part and dissenting in part.

As to the defendant Cecil Whittaker's, Inc., I agree entirely with the Court, and I join Part I of the Court's opinion. Cecil Whittaker's, Inc., was only a franchisor. It did not own, lease, or operate the place of business in question. Accordingly, it cannot be liable under the Americans with Disabilities Act.

As to the claim against the Board of Police Commissioners, however, I respectfully dissent. Special Orders, issued by the

Chief of Police of the City of St. Louis, are contained in a booklet called the St. Louis Police Manual. This booklet is distributed to police officers and is intended to govern their conduct. The Board does not contend that it did not know about the booklet. The Chief of Police is the executive and administrative head of the Police Department. To say that a Special Order issued by the Chief in written and published form is not a policy of the Police Department seems untenable to me. All policy-making power does not have to reside in the Board. The Board is allowing the Chief, at least in practice, to make policy.

But what about the content of the policy? As the lead opinion says, the Special Order speaks only of violations of the Revised Code of the City of St. Louis. It says nothing about the Missouri Human Rights Act. But witnesses for the Board, as the lead opinion acknowledges, took the position that the Special Order did apply to violations of the statute having to do with the admission of disabled persons to places of public accommodation. It seems to me that this testimony, coming from witnesses who should know what they are talking about, is sufficient, at least for purposes of summary judgment, to establish that the Board had a policy of the sort of which the plaintiff complains. Or, if there was no policy, at least there was a custom, and municipal agencies are liable if either a policy or a custom causes an injury. See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 166, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993). Whatever the Special Order says on its face, however we choose to construe it as a legal document, the fact remains that it was applied in practice as though it affected enforcement of the state statute, and not merely of the City Code.

Such a policy, which denies to disabled citizens a state-law right, and withholds from them, in that respect, law-enforcement services available to citizens generally, is inimical to the letter and spirit of federal law. Therefore, with respect to the ADA claim against the Board of Police Commissioners, I respectfully dissent.

----------Footnotes----------

n1 The Honorable Owen M. Panner, United States District Judge for the District of Oregon, sitting by designation.

n2 The Honorable Donald J. Stohr, United States District Judge for the Eastern District of Missouri.

Dated: 7/1/97

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Marilyn Pona, Plaintiff v Cecil Whittaker's, Inc., et al. Defendants

No. 4:95CV1746-DJS

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered against plaintiff Marilyn Pona and in favor of defendants Michael Calcaterra, Matthew Redden and Joseph Robinson in their individual and official capacities on all Claims asserted against them in plaintiff's first amended complaint.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that judgment is entered against plaintiff Marilyn Pona and in favor of defendants Anne-Marie Clarke, Matthew J. Padberg, Robert Haar, Freeman Bosley, Jr. and Charles Mischeaux in their individual and official capacities on all claims asserted against them in plaintiff's first amended complaint.

IT IS FURTHER ORDERED. ADJUDGED and DECREED that judgment is entered against plaintiff Marilyn Pona and in favor of defendant the St. Louis Beard of Police Commissioners on all claims asserted against it in plaintiff's first amended complaint.

IT IS FURTHER ORDERED. ADJUDGED and DECREED that judgment is entered against plaintiff Marilyn Pona and in favor of defendants Paul Lisa and Eye's Enterprises, Inc. on

the claims asserted against them in Count II of plaintiff's first amended complaint.

UNITED STATES DISTRICT JUDGE

Dated: 6/30/97

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Marilyn Pona, Plaintiff v Cecil Whittaker's, Inc., et al. Defendants

No. 4:95CV1746-DJS

ORDER

This case is set for trial on the two-week docket commencing July 7, 1997. Defendant Paul Lia is proceeding in this matter pro se. Beginning on or about September 30, 1996, mail from the Court to Paul Lia has been returned as undeliverable with no forwarding address. On November 18, 1996, the Court stated that if Paul Lia's mail was again returned as undeliverable, Mr. Lia risked an entry of default against him for failure to keep the Court apprised of his current mailing address. Since that time, Mr. Lia's mail has consistently been returned to the Court as undeliverable.

Additionally, pursuant to the Court's Case Management Order, Mr. Lia was to file his pre-trial compliance "not less than twenty (20) days prior to the date set for trial." Mr. Lia has not filed his pretrial compliance. Pursuant to E.D.Mo. L.R. 5.04, failure to comply with the Court's Case Management Order may result in the imposition of sanctions, including an entry of default. For the foregoing reasons, the Court will order the Clerk of the Court to enter a default against defendant Paul Lia.

Accordingly.

IT IS HEREBY ORDERED that the Clerk of the Court shall enter a default against defendant Paul Lia.

UNITED STATES DISTRICT COURT JUDGE

Dated: 7/21/97

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Marilyn Pona, Plaintiff v Cecil Whittaker's, Inc., et al. Defendants

No. 4:95CV1746-DJS

ORDER

Pending before the Court is plaintiff's motion to alter or amend judgment and for reconsideration. Motions for reconsideration are intended to correct manifest errors of law or fact or to present newly discovered evidence. Hagerman v. Yukon Energy Corp., 839 F.26 407, 414 (8th Cir. 1988) . Having carefully reviewed plaintiff's motion and memorandum in support, the Court will deny the motion.

In its order granting partial summary judgment, the Court found that because there was no violation of the ADA, plaintiff's §1983 claim failed. In the alternative, the Court found that plaintiff's claims of ADA violations were not cognizable under §1983. The Court also found that plaintiff had not alleged any specific constitutional provision which defendants purportedly violated, Plaintiff utilizes over two pages of her memorandum in support of her motion to reconsider to discuss a separate constitutional basis for her §1983 claim. In her memorandum in opposition to summary judgment, plaintiff stated that the basis of her §1983 claim was that "the individual Board members violated her federally protected rights as defined by Title III of the ADA."

See Mem. in Opp. to Motion for Summary Judgment of Clarke, et al., p. 8; Complaint, ¶42. plaintiff did not assert a claim that defendants' enforcement of a criminal law violated plaintiff's right to equal protection and/or due process. See Order of July 1, 1997, p. 11, n.8. In support of her motion to reconsider, plaintiff raises a new argument that she was deprived of rights under the Equal Protection Clause of the Fourteenth Amendment. "A motion to alter or amend judgment cannot be used to raise arguments which could have been raised prior to the issuance of judgment." Hagerman v. Yukon Energy CorP., 839 F.2d at 414.

For all of the foregoing reasons,

IT IS HEREBY ORDERED that plaintiff's motion to alter or amend judgment and for reconsideration [Doc. #128) is denied.

UNITED STATES DISTRICT JUDGE

Dated: 7/1/97

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Marilyn Pona, Plaintiff v Cecil Whittaker's, Inc., et al. Defendants

No. 4:95CV1746-DJS

ORDER

Plaintiff filed her first amended complaint ("complaint") against various defendants: alleging discrimination in violation of the Americans with Disabilities Act, 42 U.S.C. §12102. et seq. ("ADA") (Count I); deprivation of rights secured by federal law and the Constitution in violation of 42 U.S.C. §1983 (Count II); and discrimination in public accommodations in violation of the Missouri Human Rights Act, R.S.Mo. §213.010, et seq. ("MHRA") (Count III) . The following motions are pending before the Court: (1) motions for summary judgment filed by defendants Anne-Marie Clarke, Matthew J. Padberg, Robert Haar, Freeman Bosley, Jr., and Charles Mischeaux in their individual capacities [Doc. #86] and "as composing the Board of Police Commissioners of the City of St. Louis" ("the Board of Police Commissioners") [Doc. #84]; (2) plaintiff's cross-motion for summary judgment against defendants Clarke Padberg, Haar, Mischeaux and Bosley "as composing the Board of Police Commissioners" [Doc. #92] ; (3) a motion for summary judgment filed by defendants Matthew Rodden, Michael Calcaterra and Joseph Robinson [Doc. #85] ; and (4) a motion to bifurcate filed by defendants Rodden, Calcaterra, and Robinson, as well as defendants

Clarke, Padberg, Haar, Mischeaux and Bosley both in their individual capacities and "as composing the Board of Police Commissioners" [Doc. #102] .

A. Undisputed Facts

Plaintiff is forty-one years of age and suffers from post polio syndrome, degenerative rheumatoid osteoarthritis, degenerative joint disease, palindromic rheumatism and scoliosis. Because of her various physical afflictions, plaintiff either uses a wheelchair or walks with the aid of a certified service dog. Plaintiff has used a service dog continuously since 1985. Plaintiff's service dog is trained to provide support so that she can walk without the use of a cane.

At approximately 6:30 p.m. on September 15, 1993, plaintiff, accompanied by her Doberman Pinscher service dog, entered a Cecil Whittaker's restaurant on Grand Avenue in south St. Louis. Plaintiff had just finished giving a training class for service dogs and was meeting some of her students for dinner at the restaurant. As plaintiff was entering the restaurant, an employee told plaintiff she could not bring her dog inside and that she would have to leave, Shortly thereafter, another restaurant employee spoke to plaintiff. Plaintiff stated that she had the right to be in the restaurant with her service dog and showed the employee a copy of R.S.Mo. §209.150.fn2 As amended in 1996, fn3 R.S.Mo. 209.150 states, in part:

> 3. Every person with a visual, aural or physical disability shall have the right to be accompanied by a guide dog, hearing dog, or service dog, which is especially trained for the purpose, in any of the places listed in subsection 2 [which includes places of public accommodation] of this section without being required to pay an extra charge for the guide dog, hearing dog, or service dog; provided that

> such person shall be liable for any damage done to the premises or facilities by such dog.

Section 209.160, R.S.Mo. states:

> Any person or persons, firms or corporation, or the agent of any person or person, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities enumerated in section 209.150 or otherwise interferes with the rights of a totally or partially blind or deaf person, or a physically disabled person under §209.150 shall be guilty of a class B misdemeanor.

A dispute ensued between plaintiff and the restaurant employees. A restaurant employee called the police and St. Louis police officers Michael Calcaterra and Matthew Rodden responded to the call. When they arrived at the restaurant, Calcaterra and Rodden discussed the situation with plaintiff and the restaurant employees. Eventually, a restaurant employee called defendant Paul Lia, the restaurant manager. Lia stated that he wanted plaintiff and her dog out of the restaurant. Rodden spoke to Lia on the telephone and advised Lia that if plaintiff and her service dog were not allowed in the restaurant, he and/or the restaurant could be held civilly liable. At the time he spoke to Lia, Rodden believed that the laws in question which were being violated were civil, not criminal.

Rodden and Calcaterra advised plaintiff that the management of the restaurant wanted her to leave. Rodden and Calcaterra wrote their names on a menu for plaintiff and advised plaintiff that she could initiate a civil action and that they would testify on her behalf. Although plaintiff alleges that Rodden and Calcaterra asked her to leave the restaurant, both deny making such a request. Plaintiff left the restaurant and no arrests were made.

Calcaterra filed a police report concerning this incident. Defendant Joseph Robinson, as watch commander, signed the report indicating his approval for filing. Calcaterra hand-delivered a copy of the police report to the Civil Rights Enforcement Agency and to the St. Louis City Counselor's Office.

On July 25, 1986, the City of St. Louis Chief of Police, Robert E. Scheetz, issued Special Order 86-5-31 regarding "Public Accommodations Violation Procedures." The Special Order states, in part:

> A. Chapter 3.44 of the Revised Code of the City of St. Louis prohibits discriminatory practices in places of public accommodations. The phrase "places of public accommodations" means all places or businesses offering or holding out to the general public, services or facilities for the comfort, health, and safety of such general public including, but not limited to public places providing food, shelter, recreation and amusement. The purpose of this ordinance is "to insure that there is [sic] no discriminatory practices in places of public accommodations on account of race, color, religious beliefs, ancestry, or national origin." The provisions of the ordinance are such that, "Places serving the public shall not deny service, privileges or equal accommodation [sic] advantages to any person or account of race, color, or religion; nor post or circulate discriminatory information or advertisement."
>
> B. Members of this Department shall not take any enforcement action to force compliance with this law, nor shall any member of this Department deter any citizen

from proceeding under the conditions of the ordinance on his own initiative. The following steps shall be taken by officers at the scene of a complaint arising under this ordinance:

1. Explain the requirements for filing a complaint with the Civil Right Enforcement Agency;

2. Ascertain the information necessary for the preparation of a Public Accommodations Report;

C. The preservation of order and maintenance of the peace is primary responsibility and in breach of peace cases, the established procedures for handling such disturbances shall be followed.

D. Department members shall inform persons involved in such an incident that the only action that can be taken is for the aggrieved person or persons to make, sign and file with the St. Louis Civil Rights Enforcement Agency . . . a complaint in writing under oath. This is the only course of action that can be followed. An officer must avoid taking any sides in disputes of this nature.

***

Special Order 86-5-3l, p. 1 (emphasis in original).

Special Order 86-5-31 is directed to "all bureaus, districts and divisions." It is not a general order issued by the Board of Police Commissioners, but is an "Order of the Department" as defined in Rule 1 of the St. Louis City Police Manual. On its face, the Special Order is only applicable to violations of Chapter 3.44 of the Revised Code of the City of St. Louis.

The Special Order is silent as to discriminatory practices on the basis of disability. Nonetheless, at the time of this incident, it was the understanding of Officers Calcaterra and Rodden that the Special Order applied to enforcement of R.S.Mo. §209.150.

B. Summary Judgment Standard

This Court must grant summary judgment if, based upon the pleadings, admissions, depositions, and affidavits, there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) . The moving party must initially demonstrate the absence of an issue for trial. Id. at 323. Any doubt as to the existence of a material fact must be resolved in favor of the party opposing the motion. "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986) . Nevertheless, once a motion is properly made and supported, the nonmoving party may not rest upon the allegations in its pleadings but must instead set forth specific facts showing that there is a genuine issue of material fact for trial. Fed.R.Civ.P. 56(e) . Summary judgment must be granted to the movant if, after adequate time for discovery, the nonmoving party fails to produce any proof to establish an element essential to the party's case and upon which it bears the burden of proof at trial. Celotex Corp., 477 U.S. at 322-24. For "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323.

C. Plaintiff's Claims Against the "City of St. Louis Board of Police Commissioners"

As a preliminary matter, the Court will dismiss all of plaintiff's claims asserted against the "City of St. Louis

Board of Police Commissioners." The St. Louis Board of police Commissioners, as an entity, may only be sued by bringing action against members of the Board in their official capacity. "An action against the 'St. Louis Board of Police Commissioners' in that name alone does not lie." Best v. Schoemehl, 652 S.W.2d 740, 741 (Mo. App. 1983) ; see also Lawrence v. Bd. of Police Com'rs, 604 F. Supp. 1229, 1231 (E.D.Mo. 1985) . Although plaintiff named the "St. Louis Board of Police Commissioners" as a separate defendant, plaintiff correctly has asserted a claim against the Board of Police Commissioners by naming each of its members in his or her official capacity .

D. Count I: Violations of Title II and III of the ADA

Plaintiff alleges that she was discriminated against in violation of Title II fn4 of the ADA, 42 U.S.C. §12131-32, in that she was denied the benefits of the services of a public entity because of her disability.fn5 Plaintiff further alleges she was discriminated against in violation of Title III of the ADA, 42 U.S.C. §12182, in that she was denied the full and equal enjoyment of a place of public accommodation)

Plaintiff brings her claims under Title II against Clarke, Padberg, Haar, Mischeaux and Bosley in their individual and official capacities. Title II provides, in relevant part:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. §12132 (emphasis added) . Public entity is defined as:

> (a) any State or local government;
> (b) any department, agency, special purpose district or other instrumentality of a State or States or local government; . . .

42 U.S.C. §12131.

First, the Court will dismiss plaintiff's claims in Count I against Clarke, Padberg, Haar, Bosley and Mischeaux in their individual capacities. These individuals are not proper defendants under Title II in that they are not "public entities.! It is undisputed that the Board of Police Commissioners is a public entity, thus, the remaining defendants in Count I as to plaintiff's claims under Title II are the individual Board members in their official capacity. Plaintiff alleges the existence of such official capacity liability on the grounds that the Board of Police Commissioners:

> failed to enforce the provisions of Title III [sic] of the Americans with Disabilities Act and thereby denied plaintiff the benefits of the services of a public entity, in violation of 42 U.S.C. §12131 and §12132
>
> ***
>
> Defendants therein violated plaintiff's federally protected right to public accommodation and not to be discriminated against because of her disability.

First Amended Complaint, ¶¶30-31.

To establish a violation of Title II, plaintiff must establish that (1) she is a qualified individual with a disability; (2) that a public entity discriminated against her on the basis of her disability; and (3) that she has been excluded from

participation in or been denied the benefits of the services, programs or activities of the public entity, or been subjected to discrimination by any such entity. 42 U.S.C. §12132. Plaintiff alleges that by maintaining a policy that prohibits police officers from enforcing her right to enjoy the services of a place of public accommodation, the Board of Police Commissioners unlawfully discriminated against her. The basis of her claim of discrimination is that Special Order 86-S-31 instructs police officers to "not take any enforcement action to force compliance with this law

Special Order 86-5-31 is not evidence that the Board of Police Commissioners discriminated against plaintiff on the basis of her disability.fn7 First, Special Order 86-5-31 is not a policy of the Board of Police Commissioners. The Special Order was issued by the St. Louis City Chief of Police, not the Board of Police Commissioners.fn8 Moreover, it is undisputed that the individuals comprising the Board of Police Commissioners did not draft, issue, approve or otherwise authorize the Special Order. Additionally. Special Order 86-5-31 does not discriminate on the basis of disability but rather provides guidelines for police officers to follow in the event that they are called to the scene of a dispute involving a "Public Accommodations Violation. " Despite the officers' apparent belief, Special Order 86-5-31 only refers to Chapter 3,44 of the Revised Code of the City of St. Louis. The Special Order does not state that the officers will not enforce §209.150, rather it states how and when the officers will enforce a City Ordinance which is silent as to discrimination on the basis of disability Plaintiff has come forward with no evidence that the Special Order is discriminatory.

Finally, the crux of plaintiff's claim in Count I is that the St. Louis police officers will not enforce criminal penalties at the scene of a violation of R.S.Mo. §209.150, e.g., arrest a violator. Plaintiff has no standing to bring such a claim

because "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." Leeke v. Timmerman, 454 U.S. 83, 86 (1981) citing Linda R.S. v. Richard D., 410 U.S. 614 (1973).fn8 For the foregoing reasons, the Court will grant summary judgment on Count I in favor the individuals comprising the Board of Police Commissioners in their official capacities.

E. Count II: Violation of 42 U.S.C. §1983 -- Deprivation of Rights Secured by the Constitution and Laws of the United States

In Count II, plaintiff alleges that defendants Calcaterra, Rodden, Paul Lia, Eye's Enterprises and the individuals comprising the Board of Police Commissioners each violated plaintiff's Constitutional and statutory rights.fn9 Generally, a plaintiff may bring a cause of action pursuant to §1983 to remedy a violation of the Constitution or a federal statute. Maine v. Thiboutot, 448 U.S. 1, 5 (1980) ; Littlefield v. City of Afton, 785 F.2d 596, 600 (8th Cir. 1986) . Plaintiff has not cited any specific constitutional violation, but relies upon her allegations of violations of her federally protected rights as defined by the ADA to support her claims under §1983.

First, because the Court finds no violation of the ADA, plaintiff's §1983 claim fails. Alternatively, the Court finds that plaintiff's claims of ADA violations are not cognizable under §1983.fn10 Although the parties have not addressed this issue, the Supreme Court has held that a plaintiff alleging a violation of a federal statute will be permitted to sue under §1983 unless:

> (1) "the statute [does] not create enforceable rights, privileges, or immunities within the meaning of §1983," or (2) "Congress has foreclosed such enforcement of the statute in the enactment itself. "

Wilder v. Virginia Hosp. Assoc., 496 U.S. 498, 508 (1990) citing Wright v Roanoke Redevelopment and Housing Auth., 479 U.S. 418, 423 (1987) ; see also McMaster v. State of Minnesota, 30 F.3d 976, 981 (8th Cir. 1994) . It appears that only one United States Court of Appeals has addressed the question of whether one who alleges a violation of the ADA may bring an action under §1983 in lieu of or in addition to an action under the ADA. The Eleventh Circuit has held that "a plaintiff may not maintain a §1983 action in lieu of - - or in addition to a Rehabilitation Act or ADA cause of action if the only alleged deprivation is of the employee's rights created by the Rehabilitation Act and the ADA." Holbrook v. City of Alpharetta Georgia, 112 F.3d 1522, 1531 (11th Cir. 1997). The Court finds the reasoning in Holbrook persuasive, and finds that plaintiff's allegations of ADA violations are not separately cognizable claims under §1983. See also Foster v. Wyrick, 823 F.2d 218, 220-22 (8th Cir. 1987) (finding that the plaintiff could not use §1983 to assert his Title VII claims of disparate impact and intentional discrimination) . Based upon the foregoing, the Court need not reach defendants' remaining alternative arguments, and will grant summary judgment in favor of Calcaterra, Rodden, Paul Lia, Eye's Enterprises and the individuals composing the Board of Police Commissioners on plaintiff's claims asserted against them in Count II.

F. Count III: Violation of Missouri Laws Against Discrimination in Public Accommodations

In Count III against all defendants,fn11 plaintiff alleges that the " [d]efendants' denial of plaintiff's protected right to enjoyment of the public facility . . . is a violation of Rev. Mo. Stat. §209.160 and is a Class B misdemeanor." Complaint, ¶53. As stated above, plaintiff does not have standing to seek to enforce this Missouri criminal statute. See Leeke v. Timmerman, 454 U.S. at 86 citing Linda R.S. v. Richard D 410 U.S. 614 (1973).

Plaintiff further alleges that defendants' failure to enforce this criminal statute violates the MHRA. Plaintiff's allegation of discrimination under the MHRA is based upon the conduct of the individuals comprising the Board of Police Commissioners and the individual officers in allegedly violating and/or refusing to enforce R.S.MO. §209.150.
where plaintiff lacks standing to enforce a criminal statute, she does not gain standing to enforce the statute by labeling her claim as one under the MHRA. Moreover, as stated above, plaintiff has come forward with no evidence that any action of the individuals comprising the Board of Police Commissioners or the individual officers was discriminatory. The Board of Police Commissioners neither passed nor approved the Special Order in question and the individual officers were following what they perceived to be proper protocol for handling a situation involving an issue of "public accommodation. "

Moreover, the officers' duty to enforce statutes and ordinances is a duty owed to the general public. To the extent that plaintiff's allegations against the individual officers arise from duties owed to the public, plaintiff's claims against the individual officers are barred by the Missouri public duty doctrine. See Cooper v. Planthold, 857 S.W.2d 477, 478 (Mo, App. 1993) (public officers are not liable for damages sustained by particular individuals that result from a breach of a duty that officers owe to the general public) . Based upon the foregoing, the Court need not reach defendants' alternative arguments and will enter summary judgment in favor of Clarke, Padberg, Haar, Bosley and Mischeaux in both their individual and official capacities and Officers Calcaterra and Clarke as to Count III.

G. Remaining Claims

After the imposition of the partial judgment, plaintiff's claims against Eye's Enterprises and Paul Lia for violation of Title

III of the ADA (Count I) and violations of the MHRA (Count III) will remain. Because both Paul Lia and Eye's Enterprises are in default, the July 7, 1997 trial setting is hereby vacated. By separate order, the Court will order plaintiff to file a motion for a default judgment as to Eye's Enterprises and Paul Lia.

Accordingly,

IT IS HEREBY ORDERED that the motions for summary judgment filed by defendants Anne-Marie Clarke, Matthew J. Padberg, Robert Haar, Freeman Bosley, Jr., and Charles Mischeaux in their individual capacities [Doc. #86] and "as Composing the Board of Police Commissioners of the City of St. Louis" [Doc. #84] are granted.

IT IS FURTHER ORDERED that plaintiff's motion for partial summary judgment against defendants Clarke, Padberg, Haar, Mischeaux and Bosley "as composing the Board of Police Commissioners of the City of St. Louis" [Doc. #92] is denied.

IT IS FURTHER ORDERED that the motion for summary judgment filed by defendants Matthew Rodden, Michael Calcaterra and Joseph W. Robinson [Doc. #85] is granted.

IT IS FURTHER ORDERED that the motion to bifurcate [Doc. #102] is denied as moot.

UNITED STATES DISTRICT JUDGE

----------Footnotes----------

fn1 On February 22, 1996, plaintiff filed a stipulation for dismissal as to defendant C. W. Central Westend. On November 18, 1996, the Court dismissed plaintiff's claims against Cecil Whittaker's, Inc., Ralph Lia in his individual capacity, and Paul Lia, Ralph Lia and Jim Craddock as trustees of Eye's Enterprises, Inc. ("Eye's Enterprises") . on June 30, 1997, counsel filed a Notice of Settlement as to defendant James Craddock in his individual capacity.

fn2 Plaintiff was involved in promoting passage and/or amendments to this Missouri statute.

fn3 The 1996 amendments do not affect the rights plaintiff asserts herein.

fn4 In her complaint, plaintiff erroneously states that her claims brought pursuant to 42 U.S.C. §§12131-32 fall within Title IIIof the ADA.

fn5 Recognizing that Officers Calcaterra, Rodden and Robinson are not "public entities" within the meaning of 42 U.S.C. §12131, in her memorandum in opposition to summary judgment, plaintiff states an intention to dismiss her claims in Count I against the individual police officers. Because the Court finds that the individual officers are not "public entities, " the Court will dismiss these claims,

fn6 plaintiff brings her claims under Title III against Eye's Enterprises and Paul Lia in his individual capacity. On January 7, 1997, the Clerk of the Court entered a default against Eye's Enterprises. On June 30, 1997, the Court ordered the Clerk of the Court to enter a default against Paul Lia. Plaintiff's claims against Eye's Enterprises and Lia brought pursuant to Title III of the ADA are not before the Court for the purposes of summary judgment .

fn7 Plaintiff's claims of discrimination appear to be two-fold that she was discriminated against based on her physical disabilities and based upon her use of a service dog. The parties have not distinguished these two claims and neither will the Court. See Crowder v. Kitagawa, 81 F.3d 1480, 1484 n. 1 (9th Cir. 1996) (holding that Hawaii's quarantine requirement for those visually-impaired individuals who rely on guide dogs violated the ADA and stating that " [in] any barriers to full participation of the disabled work their discriminatory effects due to the auxiliary aids upon which the disabled rely, and not due solely to the disabling impairment") .

fn8 The Board of Police Commissioners was created by the State of Missouri, see R.S.Mo. §84.010 et seq., and is a state agency. See State of Missouri. ex rel. Homer E. Sayad v. Zych, 642 S.w.2d 907 (Mo. en banc 1982) . Like the Kansas City Board of Police Commissioners, the St. Louis Board of Police Commissioners is not a municipality "but rather a legal subdivision of the State." See Fantasma v. Kansas City Bd. of Police Com'rs et al., 913 S.W.2d 388, 391 (Mo. App. 1996) . By suing the Board of Police Commissioners, plaintiff has not sued the City of St. Louis.

fn8 "A state's enforcement of its criminal laws must comply with principles of substantial equality and fair procedure.... " McCoy v, Court of Appeals of Wisconsin, 486 U.S. 429, 435 (1988) . These principles are embodied in the Fourteenth Amendment, not the ADA. Plaintiff has not brought a claim alleging that the city's administration of this criminal law violates her constitutional rights of equal protection and/or due process.

fn9 Recognizing that the actions of defendant Robinson were not a cause of plaintiff's alleged injuries, plaintiff states in her memorandum in opposition to summary judgment an intention to dismiss Count II against defendant Robinson. The Court will dismiss this claim.

fn10 The Court reaches this conclusion as to all defendants, including Paul Lia and Eye's Enterprises. Although Paul Lia and Eye's Enterprises are in default, the Court may not enter a default judgment on a Count which fails to state a claim

fn11 Again, plaintiff's claims against Eye's Enterprises and Paul Lia are not before the Court for purposes of summary judgment.

Marilyn Pona, Appellant, vs. Cecil Whittaker's, Inc., et al., Appellees.

No. 97-3387EMSL

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

November 24, 1998, Decided

PRIOR HISTORY:

95-CV-1746DJS.

Original Opinion of September 18, 1998, Reported at:

OPINION: Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. Judge McMillian, Judge Richard S. Arnold, Judge Hansen and Judge Murphy would grant the suggestion.

The petition for rehearing by the panel is also denied.

November 24, 1998